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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

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Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

JURISDICTIONAL STATEMENT

Appellant, The Kansas City Southern Railway Company, appeals from the judgment of the Louisiana Supreme Court (dated December 11, 1961, rehearing refused January 15, 1962) upholding the validity of a section of the Louisiana Corporation Franchise Tax Statute against an attack by Appellant that the statute deprives

it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

OPINIONS OF THE COURTS BELOW

The opinion of the Louisiana Supreme Court is published in 135 So. 2d 915 (Appendix, p. 27). The judgment of the court of original jurisdiction, the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, Louisiana, is printed at Appendix page 38 The District Court did not render a written opinion, rather it assigned written Reasons for Judgment, which are printed at page 40 of the Appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

The nature of this proceeding is a civil action originally brought by Appellant pursuant to the procedure outlined in Chapter 47:1576 of the Louisiana Revised Statutes to recover that portion of Louisiana Corporation Franchise Taxes paid under protest to the State of Louisiana, levied by the Collector of Revenue of the State of Louisiana under the provisions of Louisiana Revised Statutes 47:606(B).

The opinion and decree of the Louisiana Supreme Court, sought to be reviewed, was dated and entered December 11, 1961. The order of the Louisiana Supreme Court refusing rehearing was dated and entered January 15, 1962. Notice of Appeal to this Court was timely filed in the Louisiana Supreme Court on March 7, 1962.

The Louisiana Supreme Court is the highest court of the State of Louisiana available to Appellant.(1) Appellant's remedies in the Louisiana state courts were exhausted(2) and the judgment became final on January 15, 1962, when the Louisiana Supreme Court refused to grant a rehearing.(3)

Jurisdiction of this Honorable Court is invoked under Title 28 of the United States Code, Section 1257(2). The validity of Section 606(B) of the Louisiana Corporation Franchise Tax Statute, (La. R.S. 47:606(B) Appendix, p. 43) is drawn in question on the ground that said section of the statute, as interpreted by the Louisiana Supreme Court and as applied to Appellant, is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States in that its application results in a taking of Appellant's property without due process of law. The decision of the Louisiana Supreme Court specifically upholds the constitutional validity of Section 606(B) of said Louisiana Corporation Franchise Tax Statute as interpreted and applied by the Collector of Revenue.

Cases sustaining jurisdiction of this Court in this cause include:

> *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 82 L. ed 673 (1937);

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(1) Louisiana Constitution of 1921, Article 7 § 10.

(2) Louisiana Code of Civil Procedure, Article 2167 (1).

(3) Louisiana Supreme Court Rules, Section 12(3).

Safe Deposit T. Co. v. Virginia, 280 U. S. 83, 74 L. ed 180 (1929);

New York Ex Rel Whitney v. Graves, 299 U. S. 366, 81 L. ed 285 (1936);

Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 81 L. ed 1193 (1936).

THE STATUTE INVOLVED

The Louisiana state statute involved is section 606(B) of the "Louisiana Corporation Franchise Tax" Statute, Volume 25, pages 460-461, West's Louisiana Revised Statutes of 1950, Annotated, Chapter 47, Section 606(B). The text of the applicable portions of the statute is set out verbatim in the Appendix, page 42-44.

QUESTIONS PRESENTED BY APPEAL

(1) Does the Louisiana Corporation Franchise Tax Statute deprive a corporation legally domiciled in the State of Missouri of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by including **as Louisiana assets** in the measure of the tax the nonresident corporation's intangible personal property and the income therefrom, when such property is physically located in the State of New York, and when the nonresident corporation has not established a commercial domicile in the State of Louisiana and the property has not been located or used within the State of Louisiana or acquired a business situs therein?

(2) Is the apportionment formula of the Louisiana Corporation Franchise Tax Statute, as interpreted by the

Louisiana Supreme Court and as applied by the defendant, so unreasonable as to constitute a taking of the nonresident corporation's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States when such apportionment formula includes, as a measure of the tax, property and income from such property which is beyond the taxing jurisdiction of the State of Louisiana and has no connection with the taxpayer's business conducted within the State of Louisiana?

STATEMENT OF THE CASE

(a) The Facts

This case involves a determination of the constitutionality of Section 606(B) (La. R.S. Title 47)[4] of the Louisiana Corporation Franchise Tax Statute as applied to the Appellant-taxpayer, The Kansas City Southern Railway Company for the years 1951 and 1952.

As the Louisiana Supreme Court recognized, the facts are not in dispute.[5]

Appellant is a foreign corporation organized and existing under the laws of the State of Missouri. It owns all of the outstanding capital stock and bonds in three other corporations which do business in the State of Louisiana, to-wit:

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(4) Appendix, p. 43.

(5) Opinion of Louisiana Supreme Court, 135 So. 2d 915, 916, Appendix, p. 28.

(a) Louisiana & Arkansas Railway Company.

(b) The Kansas City, Shreveport and Gulf Terminal Company.

(c) Kansas City Southern Transport Company, Inc.

The certificates representing these shares of capital stock and bonds are physically located in the State of New York.

The amount of tax and interest here in question results from the Collector's allocating to Louisiana (a) a portion of the value of Appellant's investment (represented by capital stocks and bonds) and receivables from Louisiana & Arkansas Railway Company, The Kansas City, Shreveport and Gulf Terminal Company, Kansas City Southern Transport Company, Inc., and (b) a portion of the revenue derived from the intangible investment in the aforesaid corporations.

Appellant is an operating railway company, engaged in the transportation of passengers, freight, mail, and express in interstate commerce between the states of Missouri, Kansas, Oklahoma, Arkansas, Texas and Louisiana.

Louisiana & Arkansas Railway Company is incorporated in the State of Delaware. It is an operating railway company, engaged in the transportation of passengers, freight, mail and express in interstate commerce between the states of Texas, Arkansas and Louisiana.

The Kansas City, Shreveport and Gulf Terminal Company is incorporated in the State of Louisiana. It

owns and operates the Union Depot Terminal in Shreveport, Louisiana.

Kansas City Southern Transport Company, Inc., is incorporated in the State of Louisiana. It is engaged in the transportation of freight by motor carrier in interstate commerce between the states of Missouri, Oklahoma, Arkansas, Texas and Louisiana.

These three subsidiaries each paid a franchise tax based upon the identical assets (involved herein) upon which the parent corporation is also taxed.

The principle offices and headquarters of Appellant are located in Kansas City, Missouri, where the Executive, Treasury, Accounting, Traffic, Passenger, Engineering, Purchasing, and Signals and Communications Departments are located, where all top management decisions are made, and where directors and stockholders meetings are held. Appellant does not have a general office or any offices of similar magnitude or importance in Louisiana.

Appellant operated as a railroad in the State of Louisiana for approximately 40 years prior to acquiring the stock of Louisiana & Arkansas Railway Company. Likewise, the L&A operated in Louisiana for 39 years prior to the time Appellant acquired its stock.

Appellant's main line track extends from Kansas City, Missouri, to Shreveport, Louisiana, Lake Charles, Louisiana, and Port Arthur, Texas. The main line track of the Louisiana & Arkansas Railway Company extends

from Dallas, Texas, to Hope, Arkansas, and through Shreveport, Minden, Alexandria and Baton Rouge, to New Orleans, Louisiana.

Appellant and the three subsidiary companies are separate. Each is a distinct operating entity. For example, accounting for receipts received for interline passenger and freight service is made between Appellant and Louisiana & Arkansas Railway Company for the respective portion of the fare earned by each corporation on the same basis as are all accountings between Appellant and other foreign lines.

Appellant's operating train crews do not operate over tracks owned by Louisiana & Arkansas Railway Company, nor do crews of the latter corporation operate over Appellant's tracks. Also, labor contracts covering employees of the two corporations are different.

Appellant and the subsidiary corporations each file separate reports with the Interstate Commerce Commission and the Louisiana Public Service Commission. The reports are not consolidated, and each corporation files its own separate corporation franchise tax return and pays its own tax.

For the years in question Appellant, KCS, filed its Louisiana Corporation Franchise Tax returns and paid the amounts shown thereon. Thereafter, the Collector caused an audit to be made and on the basis of that audit, demanded additional corporation franchise taxes. Appellant paid the additional taxes and interest thereon

under protest and timely filed suit to recover the protested taxes and interest.

The amount of the tax at issue herein, which resulted from the Louisiana Collector of Revenue demanding the additional tax under La. R.S. 47:606(B) is $30,383.66.

Appellant contests the additional tax which it paid under protest and herein claims on the grounds that its legal domicile, and hence the legal situs of the intangibles, is in the State of Missouri; that the Collector of Revenue for the State of Louisiana, Appellee, has not shown that the KCS has established a "commercial domicile" in the State of Louisiana and that the Collector of Revenue has not shown that the intangibles are used as an integral part of Appellant's business in Louisiana so as to acquire a "business situs" here. Hence, the intangibles and the revenue therefrom are beyond the taxing jurisdiction of the State of Louisiana, and the allocation formula (La. R.S. 47:606(B)) through which such intangibles and income therefrom are subjected to the Louisiana Corporation Franchise Tax, **as Louisiana assets**, constitutes a taking of the property of the Kansas City Southern Railway Company without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) Manner In Which Federal Question Presented.

The federal question sought to be reviewed was raised by Appellant in the court of first instance, the

Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana, by the allegations in paragraphs 18, 19 and 20 of Appellant's original petition. (Appendix p. 45).

The Nineteenth Judicial District Court, in its judgment, passed upon the federal question sought to be reviewed by holding that the Louisiana Corporation Franchise Tax Statute, as applied to Appellant, does not violate the Fourteenth Amendment to the Constitution of the United States. (Appendix p. 38).

Appellant specifically appealed from the judgment of the District Court, and, with respect thereto, made the following Specification Of Errors at page 13 of its original brief in the Louisiana Supreme Court (Record, p. 17):

> "1. The District Court erred in holding that La. R.S. 47:606(B) is constitutional as applied to appellant-taxpayer without first finding jurisdiction over the property and income by which the tax is measured."

The Louisiana Supreme Court affirmed the judgment of the District Court and in its opinion directly passed upon the federal question sought to be reviewed by holding that the tax as interpreted and applied by the Collector of Revenue did not violate the Due Process clause of the Fourteenth Amendment. (Appendix p. 31, 34-37).

Thus, the federal constitutional question relating to whether or not Section 606(B) of the Louisiana Corporation Franchise Tax Statute, as applied to Appellant,

violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution has been squarely raised in the original pleadings and was actively at issue throughout. Both the court of first instance and the Louisiana Supreme Court held that the Corporation Franchise Tax Statute does not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(c) The Louisiana Franchise Tax Statute.

The State of Louisiana annually imposes a tax on corporations, domestic or foreign, as an excise "for the privilege of carrying on or doing business, the exercising of its charter, or the continuance of its charter within this state." (La. R.S. 47:601, Appendix, p. 42) The tax is levied at the rate of $1,50 for each $1,000.00 or major fraction thereof on the amount of the corporation's "capital stock, surplus, undivided profits, and borrowed capital" as determined by the several sections of the franchise tax statute — La. R.S. 47:601-607, inclusive.

Taxable capital is determined by Sections 602-605 of the statute.

For the purposes of ascertaining the capital and revenue upon which the franchise tax is imposed, taxable capital is allocated according to the "General Allocation Formula" found in Section 606 A (Appendix, p. 43), which provides in part that:

> "* * * every corporation subject to the tax is deemed to have **employed in this state** the proportion of its

entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

"(1) The ratio that the net sales and other revenue **attributable to Louisiana** bears to the total net sales and other revenue * * *.

"(2) The ratio that the value of all the taxpayer's property and assets **situated or used in Louisiana** bears to the value of all of its property and assets wherever situated or used * * *."

Although on its face the Statute intends only to include in the measure of the tax assets and revenue of a non-resident which are "employed in", "attributable to", and "situated or used in", Louisiana, the application of Section 606(B) as interpreted by the Louisiana Supreme Court results in computing the tax on assets and revenue which have absolutely no relationship with the taxpayer's business in Louisiana. Section 606(B) provides in part:

"47 § 606 B. **Allocation of intercompany items.** For the purpose of allocation, investments in, advances to, or revenues from a * * * subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the * * * subsidiary corporation. * * *."

Applying the above-quoted subsection (B) to Appellant, for the years 1951 and 1952 the Collector of Revenue included as a **Louisiana asset** of Appellant its investment in the three subsidiary corporations (represented by capital stocks and bonds located outside of the State

of Louisiana, which never were used or acquired a business situs within Louisiana) by taking the following percentages **of capital employed in Louisiana by the subsidiary corporations:**

	1951	1952
Louisiana & Arkansas Railway Company	73.3185%	70.9843%
Kansas City Southern Transport Company, Inc.	55%	57.9%
The Kansas City, Shreveport and Gulf Terminal Company	100%	100%

Likewise, the Collector included **as a Louisiana asset of Appellant** that portion of the revenue received from its investment in the capital stocks and bonds of the subsidiary corporations based on the said percentages.

(d) The Effect of the Statute (47:606 B)

Under the provisions of Section 606(B) of the Louisiana Corporation Franchise Tax Statute, the Louisiana assets and Louisiana revenues of Appellant, which are included in the general allocation formula under Section 606(A) as a basis for determining the Louisiana property subject to the tax (ratio of Louisiana assets and revenue to all assets and revenues wherever situated) are increased **by including, on the Louisiana side of the balance sheet, assets which are neither located or used in Louisiana and revenues (in the form of interest and dividends) which are not received by Appellant in Louisiana.**

By including 73%, 55% and 100% of Appellant's intangible personal properties and the revenue therefrom,

which are beyond Louisiana's jurisdiction, the ratio of Appellant's Louisiana assets and revenue is substantially increased, thus increasing the amount of the franchise tax.

THE QUESTIONS ARE SUBSTANTIAL

Louisiana Cannot By Legislative Fiat Enlarge Its Jurisdiction To Tax

This Court has firmly established the principle that the taxing power of a state may not extend beyond its jurisdiction. As stated in *Safe Deposit T. Co. v. Virginia*, 280 U. S. 83, 92, 74 L. ed 180, 184 (1929):

> "A statute of a state which undertakes to tax things wholly beyond her jurisdiction and control conflicts with the 14th Amendment."

The State of Louisiana flagrantly violates this Constitutional principle by employing a device in its franchise tax statute to tax a corporation upon a privilege which is derived from the laws of a foreign state and never exercised nor enjoyed within the State of Louisiana!

The Louisiana Corporation Franchise Tax, like similar statutes of other states, is levied upon foreign corporations for the privilege of doing business in Louisiana. La. R. S. 47:601 (Appendix p. 42). Failure to pay the tax subjects a corporation to loss of its Louisiana franchise and loss of its right to engage in commerce in Louisiana. La. R. S. 12:65.

To determine the value of the privilege enjoyed in Louisiana under the allocation formula contained in Sec-

tion 606(A), a ratio is obtained by the amount of revenue and value of assets attributable to Louisiana bears to revenue and assets wherever situated. Of this formula, itself, the appellant taxpayer does not complain.

Appellant's complaint, which it urges is in direct contravention of the due process clause of the Fourteenth Amendment, is that Sections 606(A) and 606(B) as interpreted by the Louisiana Supreme Court and applied by appellee, allows the Collector of Revenue, to reach beyond Louisiana's taxing jurisdiction and include **as a Louisiana asset and Louisiana revenue** in the general allocation formula (Section 606A) the taxpayer's property and revenue **over which Louisiana has absolutely no jurisdiction.**

As Justice Holmes stated in *Wallace v. Hines*, 253 U. S. 66, 69-70, 64 L. ed 782, 786 (1919):

> "The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart, — **not, in other words, to open to taxation what is not within the state.**"

This case is **not** like *Northwestern States Portland Cement Company v. State of Minnesota*, 358 U. S. 450, 3 L. ed 2d 421 (1959) in which this Court found that the tax was levied on the taxpayer's income "• • • from its activities within the taxing state."

Appellant's commerical domicile is in the State of Missouri, at its general office, where its management functions. Missouri is also its legal domicile. The intangible stocks and bonds of the subsidiary corporations are physically/located in the State of New York. The legal domicile and the business situs of these intangibles are at the domicile of their owner, the State of Missouri. The intangibles are *not used* in Appellant's Louisiana business. The privilege accorded Appellant to own these intangibles is **only accorded by the State of Missouri.**

The State of Louisiana has no constitutional right to levy a tax upon a privilege which it does not extend to Appellant but which Appellant enjoys only in the State of Missouri. See *St. Louis Compress Co. v. Arkansas*, 260 US 346, 67 L ed 297, 299 (1922), and *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 82 L. ed 673 (1937), where this Court struck down a similar attempt by the State of California to tax a privilege afforded a nonresident taxpayer by the State of Connecticut, holding:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, *we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it.* Hence it is that a state which *controls the property* and activities *within its boundaries* of a foreign corporation admitted to do

> business there may tax them. *But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.* (303 U.S. 80, 82 L. ed 677)
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> • • •

In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 424, 81 L. ed 1193, 1200 (1936), the Court again reiterated the constitutional limitations on a state to levy a privilege tax by saying:

> "The state may not tax real property or tangible personal property lying outside her borders; *nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.*" (Emphasis added)

In the *Great Atlantic & Pacific Tea Company* case this Court found that the Louisiana excise tax statute, as applied to the taxpayer, did not violate the due process clause of the Fourteenth Amendment because the taxpayer, a national chain store, was engaged in a "unitary" business, i.e., the Louisiana chain stores were "integral parts of a much larger organization." Those are **not** the facts here and the above-quoted rule is certainly applicable in the instant case.

It is not disputed that the Appellant taxpayer and each of the subsidiary corporations are completely separate operating legal entities. Each runs its own business, none is dependent upon the other. The four corporations are **not** integral parts of some large organization and consequently **Appellant is not engaged in a unitary business**

with its subsidiaries. It does **not** operate **through** its subsidiaries!

This Court has on many occasions recognized the presumption that intangibles may only be taxed at their domiciliary location, and to overcome the presumption proof that the intangibles have obtained a business situs elsewhere must be very strong. *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 307 U.S. 313, 321, 83 L. ed 1312, 1318 (1938), *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 75 L. ed 131 (1930).

Before a state can extend its taxing authority to intangible property which is beyond its jurisdiction under the guise of a franchise tax statute, there must be a showing that the intangibles have acquired a business situs through location and use within the taxing state. Thus, in the leading case of *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 69 L. ed 169 (1924), in considering the relationship of the privilege afforded the taxpayer by a franchise tax imposed by the State of Ohio, this Court said:

> "In cases involving the validity of the laws of a state imposing license fees or exercise taxes on corporations organized in another state, this court has decided:
>
> • • • •
>
> "Consistently with the due process clause, *a state cannot tax property belonging to a foreign corporation, and neither located nor used within the confines of the state.*" (266 U.S. 81, 69 L. ed 176) (Emphasis added)

By interpreting Section 606(B) of the Louisiana statute so as to increase the tax by the privilege enjoyed by Appellant in the State of Missouri, without first finding a business situs of the intangibles in Louisiana, the Louisiana Supreme Court completely disregards the limitations of the state's jurisdiction and violates the fundamental tests laid down by this Court. The ground upon which the decision of the Louisiana Supreme Court was based, as stated by the Court, was:

> "We agree with the District Court's ruling that **'it is IMMATERIAL whether or not the taxpayer has established a legal or commercial domicile or a business situs of the intangibles in Louisiana; nor is it necessary that the certificates representing the investment in stocks and bonds of the subsidiaries be located in or used within Louisiana * * *.'**
>
> * * * *
>
> **"* * * there is no extraterritorial exertion of the taxing power involved in including property located in other states in measuring a tax imposed upon a privilege."**
>
> (135 So. 2d 910, Appendix p 32, 35) (Emphasis added).

The principle that the tax situs of intangibles is at the domicile of the owner except under circumstances where it can be shown that some foreign state has acquired jurisdiction through the well recognized exceptions of "commercial domicile" and "business situs" is firmly entrenched in our law. The principles were recognized and followed by this Court in *Wheeling Steel Corporation v. Fox*, 280 U.S. 193, 80 L. ed 1143 (1935), *National*

Leather Company v. Massachusetts, 277 U.S. 413, 72 L. ed 935 (1927), and other cases decided by this Court.

As stated in *Blodgett v. Silberman*, 277 US 1, 9, 72 L. ed 749, 757 (1927) the maxim that movables follow the person is permanently fixed by our law.

The Louisiana Supreme Court, however, says that these basic rules are "immaterial," and consequently Louisiana can include in the measure of its tax intangible property which is beyond its jurisdiction and thereby tax a privilege enjoyed by and granted to a foreign corporation by another state!

This decision of the Louisiana Supreme Court stands alone — other states adhere to the constitutional prohibition against extraterritorial taxation. Decisions of other state supreme courts(6) show that the basic principles

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(6) To include in the measure of a franchise tax capital stock owned by a nonresident corporation and not used within the taxing state"* * * would be to levy a franchise tax having no relation to the privilege granted by this State * * *." **Commonwealth v. Columbia Gas & Electric Corp.**, 8 A.2d 404 (S. Ct. Pa. 1939); Intangible property of a foreign corporation "* * * does not acquire a 'business situs' here * * * where such property is held outside of this state and is not used or employed in business transacted within this state." **Chestnut Securities Co. v. Oklahoma Tax Comm.**, 48 P.2d 817 (S.Ct. Okla. 1935); Where corporation "* * * not domiciled in Florida, either legally or commercially and the said intangibles had no actual business situs in Florida * * *", intangibles not subject to taxation. **Gay v. Bessemer Properties**, 32 So.2d 587 (S.Ct. Fla. 1947); Whether or not a foreign corporation has a commercial domicile in the taxing state "* * * bears very materially * * *" in measuring a privilege tax on intangibles. **Udylite Corp. v. Michigan Corp. & Sec. Comm.**, 319 Mich. 1, 29 N.W.2d 132 (S.Ct. Mich. 1947).

controling the situs for taxation of intangibles in franchise and privilege taxes are adherred to and followed as a barrier to extraterritorial taxation of intangible property of non-resident corporations.

Articles written by an eminent member of the bar[7] and by a United States Senator[8] focus upon the constantly increasing practice of some states to attempt to extend their taxing jurisdiction by means of apportionment formulae.

Under the decision of the Louisiana Supreme Court in this cause, the State of Louisiana does not adhere to its constitutional limitations of taxation. Through the guise of a franchise tax Louisiana extends its authority into the State of Missouri to tax a privilege which only Missouri affords Appellant with respect to the intangibles. Louisiana does this by disregarding the tests of situs of intangibles for purposes of taxation which have been established by this Court and followed by the courts of other states on the ground that these principles are "immaterial."

It cannot be said that the privilege afforded to Appellant by the State of Louisiana is in anyway enhanced by the fact that Appellant, **at its legal domicile and principal office in Missouri**, owns capital stocks and bonds of other corporations who are present and also do bus-

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(7) **Taxation Without Representation Modernized**, Floyd E. Britton Esq., A.B.A.Jol. April and May issues 1960.

(8) **The Problems of Multi-State Taxation of Interstate Commerce Income**, Honorable John Sparkman, A.B.A.Jol. April issue 1960.

iness in Louisiana. A state cannot tax a parent corporation because of the presence in the state of its wholly owned subsidiaries. *People ex rel. Studebaker Corporation of America v. Gilchrist*, 244 N.Y. 114, 155 N.E. 68 (1926), (Cardozo, J.)

The Apportionment Formula of Section 606(B) is Unreasonable and Arbitrary.

> "For the purpose of allocation, investments in, advances to, or revenues from a * * * subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the * * * subsidiary corporation." (Section 606 (B)

Under this section of the Statute, Appellee includes as a Louisiana asset that portion of the Appellant's intangible investment and revenue therefrom in the three subsidiary corporations, **not by the ratio of business done by Appellant in Louisiana (18%)**, but by the ratios (73%, 50% and 100%) on which each of the subsidiary corporation's individual Louisiana Corporation Franchise Tax is computed! Each of the subsidiary corporations **paid its own franchise tax on the basis of these ratios!**

It is easily seen therefore, that by applying Section 606(B), a much greater ratio of business purportedly done in Louisiana by the Appellant results from the application of the general allocation formula (Section 606A).

The formula of Section 606(B) is not fairly calculated to assign to Louisiana a portion of the capital stock, borrowed capital, and surplus, as is proportionate with

Appellant's business done in Louisiana. The formula is unreasonable per se. Appellant's investment in the subsidiaries has nothing to do with the business the Appellant conducts in Louisiana.

In *Hans Rees' Sons v. North Carolina Ex Rel. Maxwell*, 283 U.S. 123, 75 L. ed 879 (1930), involving a foreign corporation engaged in a unitary enterprise, this Court struck down an allocation formula, ostensibly fair on its face, as being so unreasonable and arbitrary in its application as to result in extraterritorial taxation.

In that case by using such an unreasonable formula, the State of North Carolina included 83% of income earned in the measure of the tax of Hans Rees' Sons, when in actuality only 17% of the income had its source in the state.

Can it be any less unreasonable for Louisiana to allocate 73% of Appellant's investment in the Louisiana & Arkansas Railway Company in view of the fact that Appellant only does 18% of its business in Louisiana?

The principle of the *Hans Rees'* case is even more applicable here because the Appellant and the subsidiaries are *not* engaged in a unitary enterprise.

The undisputed facts show that the capital stocks and bonds were not used as integral parts of Appellant's Louisiana business — that the intangibles did not acquire a business situs in Louisiana.

The intangibles and the revenue derived therfrom are indeed *not* Louisiana assets. Any formula or alloca-

tion which makes them such is so unreasonable as to be in violation of the Due Process Clause of the Fourteenth Amendment.

The formula is further unreasonable in that the measure of the amount of the investment in the subsidiarises, based upon the average of ratios of the subsidiaries, is foreign to the amount of business Appellant conducts in the state **and has no relationship to the value of the privilege granted to the Appellant.** Especially is this true in that the evidence is overwhelming that the four corporations operate separate and apart from one another.

Section 606(A) of the Statute, the general allocation formula, is designed to reach only the business done by a foreign corporation in Louisiana. But by employing Section 606(B) to increase the amount of the **Louisiana** business and revenue under 606(A) by including **out-of state investments** in other corporations, the average of ratios is thrown out of all proportion with business done in Louisiana.

CONCLUSION

Section 606(B) of the Louisiana Corporation Franchise Tax Statute, as interpreted by the Louisiana Supreme Court and as applied by the Appellee, the Collector of Revenue of the State of Louisiana results in a taking of the property of Appellant, The Kansas City Southern Railway Company, without due process of law in violation of the Fourteenth Amendment to the Constitution of the United Staes.

The application of the unrealistic, arbitrary and unreasonable formula of Section 606(B) results in the State of Louisiana extending its taxing authority beyond its jurisdiction and levying a tax on a privilege which is enjoyed by Appellant only by virtue of the laws of the State of Missouri.

The questions presented by this appeal are substantial and of public importance. A mountain of uncertainty, confusion, and problems exists in connection with the issues of multi-state taxation involved in this case. These problems are inherent in the franchise tax statutes of every state. The problems confronting both the states and the taxpayers cannot be solved by state statutes, decisions of state courts, even by Congress. The constitutional issues involved here can only be resolved and finally settled by this court. The decision of the Louisiana Supreme Court should not be allowed to stand as a precedent for other states to employ similar allocation formulae, further whittling away at the Fourteenth Amendment as a safeguard against extraterritorial taxation.

Respectfully submitted,

W. Scott Wilkinson
John C. Christian
Milton W. Schober
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Shreveport, Louisiana

CERTIFICATE

I, W. Scott Wilkinson, one of the attorneys for Appellant herein, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the .....day of April, 1962, I served copies of the foregoing Jurisdicitional Statement on all parties in this cause, by mailing a copy in a duly addressed envelope, with postage paid to counsel of record for said parties.

This ..... day of April, 1962.

.....

Of Counsel for Appellant

APPENDIX A

KANSAS CITY SOUTHERN RAILWAY COMPANY

v.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA

NO. 45708.

SUPREME COURT OF LOUISIANA

Dec. 11, 1961.

Rehearing Denied Jan. 15, 1962.

(135 So. 2d 915)

FOURNET, Chief Justice.

The appellant, Kansas City Southern Railway Company, having paid under protest certain additional corporation franchise taxes for the years 1951, 1952, 1953, and 1954, plus interest thereon, following an audit of its returns for those years and resultant demand for additional payments by the Collector of Revenue for the State of Louisiana, and availing itself of the remedy at law in such case afforded by R.S. 47:1576, instituted this suit against the Collector for the recovery of the amounts paid, protesting four separate items upon which the additional tax was claimed. The instant appeal[1] is from an adverse

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(1) Jurisdiction of the appeal is vested in this Court since the constitutionality of a "tax * * * levied by the state" was contested. Louisiana Constitution of 1921, Article 7, Section 10(1).

judgment on one of the items,[2] in amount of $30,383.66, involving a compution of the tax in accordance with the provisions of R.S. 47:606B—the District Court having rejected plaintiff's attack on the constitutionality, as applied to it, of those provisions.

The facts are not in dispute. The Kansas City Southern Railway Company, generally known as "the KCS" and so referred to herein, is a foreign corporation organized and existing under the laws of the State of Missouri, where its home office is maintained; it is an operating railway company engaged in interstate commerce between the states of Missouri, Kansas, Oklahoma, Arkansas, Texas and Louisiana, with its main line track extending from Kansas City, Missouri, southward through Shreveport and Lake Charles, Louisiana, to its terminus at Port Arthur, Texas. The KCS owns all of the outstanding capital stock and bonds in three other corporations which do business in Louisiana—(a) the Louisiana & Arkansas Railway Company, a Delaware corporation engaged in transporting passengers, freight, mail and express between the states of Texas, Arkansas and Louisiana, the main line of which joins the KCS at Shreveport and continues southeastward through Alexandria and Baton Rouge to New Orleans; (b) the Kansas City Southern Transport Company, Inc., a Louisiana corporation engaged in the transportation of freight by motor carrier in interstate commerce between the states served by the KCS railroad; (c) the Kansas City, Shreveport and Gulf Terminal Company, a Louisiana corporation which owns and operates the

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(2) Judgment was rendered in favor of plaintiff as to two items; as to the remaining two, the plaintiff's demands were rejected. The Collector did not appeal from that portion of the judgment adverse to him, and plaintiff does not complain with respect to one item on which the Collector prevailed, so that the appeal is limited to the remaining item.

Union Depot Terminal in Shreveport. The franchise taxes due Louisiana by these corporations were paid in due course. The said stocks and bonds, representing plaintiff's invesments in and advances to the three corporations named above, are physically located in the State of New York.

The Louisiana Corporation Franchise Tax, embodied in the Revised Statutes of 1950 as R.S. 47:601 et seq., is imposed annually on a corporation, domestic or foreign, as an excise "for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter" within Louisiana (R.S. 47:601); according to provisions in effect during the taxable years in question, the rate of $1.50 was imposed for each $1,000.00 or major fraction thereof on the amount of a corporation's "capital stock, surplus, undivided profits, and borrowed capital"— this taxable capital to be determined by the corporation according to definitions in succeeding sections (R.S. 47:602-605), then used as a basis for computing the franchise tax according to a formula for allocating taxable capital, thus arriving at the extent of the use of the franchise in this State. According to this "General allocation formula" (R.S. 47.606A), "* * * every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios: (1) The ratio that the net sales and other revenues attributable to Louisiana bears to the total net sales and other revenue * * * (2) The ratio that the value of all the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used * * *." Thus, the ratios so obtained are averaged and the resulting percentage applied to the taxable capital to determine the amount thereof employed in Louisiana. The provision with which

we are here particularly concerned (R.S. 47:606B) declares, under the subtitle "Allocation of intercompany items," that for the purpose of the said general allocation formula, "investments in, advances to, or revenues from a * * * subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the * * subsidiary corporation. * * *."[3] Thus, if a corporation owns, in addition to its other assets within and without Louisiana, the majority of the capital stock in a corporation which has a 60% ratio for Louisiana corporation franchise tax purposes, then 60% of its investment in the subsidiary, and 60% of its revenues from the subsidiary, must be included in the Louisiana assets used to determine the ratio of Louisiana assets to total assets as required under the general allocation formula.

The particular assessment contested in this appeal was an outgrowth of the application of the corporation franchise tax ratios for the three subsidiaries covering the years 1951 and 1952; those ratios were, for the respective years, (a) for Louisiana and Arkansas Railway Company, 73.3185% and 70.9843%; (b) for Kansas City Southern Transport Company, 55% and 57.9%; (c) for Kansas City, Shreveport and Gulf Terminal Company, 100% and 100%. Applying the provisions of the statute, the Collector allocated to Louisiana, on the basis of the above ratios and for the purpose of determining the ratio of plaintiff's assets applicable to Louisiana, the appropriate proportion of plaintiff's investments in and advances to said sub-

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(3) A subsidiary corporation is defined in the same subdivision (R.S. 47:606B) as "any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; * * *."

sidiaries, and the appropriate proportion of the revenues derived from the stocks and bonds of the said subsidiaries.

The plaintiff-appellant contests this additional tax on the ground "that its legal domicile, and hence the legal situs of the intangibles, is in the State of Missouri; that the Collector of Revenue has not proved that the KCS has established a 'commercial domicile' in the State of Louisiana; that the Collector of Revenue has not proved that the intangibles are used as an integral part of appellant's business in Louisiana so as to acquire a 'business situs' here. Hence, the intangibles and the revenue therefrom are beyond the taxing jurisdiction of the State of Louisiana, and an allocation formula through which such intangibles and income therefrom are subjected to a tax, or through which such intangibles and the income therefrom are used as a measure of tax, constitutes a taking of the property of The Kansas City Southern Railway Company without due process of law in violation of Article 1, Section 2 of the Constitution of the State of Louisiana and the Fourteenth Amendment to the Constitution of the United States."

[1] It is well to state here that one who attacks a formula of apportionment of income prescribed by a statute imposing a tax on corporations doing business both within and outside the state has the burden of showing, by "clear and cogent evidence," that the formula results in the unconstitutional taxation of extraterritorial values. Butler Brothers v. McColgan, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991; Norfolk & W. R. Co. v. State of North Carolina, 297 U.S. 682, 56 S.Ct. 625, 80 L.Ed. 977.

[2, 3] The value or worth of the privilege of doing business in the taxing state need not be limited to the value of the tangible assets owned or used by the taxpayer therein, and it is well settled that a state may, within certain limits measure or compute the amount of an excise or franchise tax upon a foreign corporation with refer-

ence to assets or income which would be immune to a direct property tax. Thus, while the legal situs of intangibles for tax purposes is normally regarded as the domicile of the owner, the courts usually have upheld the propriety of including intangible property in determining the base upon which a franchise tax on a foreign corporation is to be computed—sometimes on the theory of a business situs having been acquired in the taxing jurisdiction, sometimes on the reasoning that, a franchise tax being an excise and not an ad valorem tax, there is no extraterritorial exertion of the taxing power involved in including property located in other states in measuring a tax imposed upon a privilege. See 131 A.L.R. at 940, Anno., Franchise tax, inclusion of intangibles; 51 Am.Jur. 770, 771, Verbo Taxation, Secs. 863, 864.

[4] The principles which control the inquiry in that respect have been declared by the United States Supreme Court, which has said that a statute calling for a "method of allocation" which is "fairly calculated" to assign to the taxing state that portion of the net income, capital, or other item upon which the amount of the tax is based, "reasonably attributable" to the business done there, meets any standards required by the due process clause of the Federal Constitution. See Butler Bros. v. McColgan, supra, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991 and cases cited in 86 L.Ed. at 996. The power of a state to include in the measure of an excise tax upon a foreign corporation intangible assets having some relationship to the franchise exercised within the state was recognized in Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271, 45 S.Ct.

82,[4] 69 L.Ed. 282. A similar levy[5] was upheld in Ford Motor Co. v. Beauchamp, 308 U. S. 331, 60 S.Ct. 273, 84 L.Ed. 304, and in the course of its opinion the Court aptly observed: "* * * The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. * * * In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. * * * The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state. * * *" (60 S.Ct. at 275, 84 L.Ed. at 306) See, also, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R.2d 293. And in National Leather Company v. Commonwealth of Massachusetts, 277 U.S. 413, 48 S.Ct.

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(4) In that case a tax was laid for the privilege of doing business in New York determined, for corporations which did not transact all their business within that state, by a percentage of that part of the net income which is calculated by the proportion which the aggregate of specified classes of property within the state bears to all the property of the corporation.

(5) An annual franchise tax was imposed on all corporations authorized to do business in the State (Texas), measured by a graduated charge upon such proportion of the outstanding capital stock, surplus, and undivided profits of the corporation, plus its long-term obligations, as the gross receipts of its state business bear to the total gross receipts from its entire business.

534, 72 L.Ed. 935, the plaintiff, a Maine corporation which conducted its leather business wholly in Massachusetts, owned the entire capital stock of two other Maine corporations which operated tanneries in the taxing state and whose activities the taxpaying corporation made use of as an essential part of its business; the taypayer challenged the inclusion in the measure of an excise tax upon it, a foreign corporation, of the value of its stock in the subsidiary companies on the assumption that the situs of the stock followed the domicile of the owner; but the Supreme Court held that Massachusetts was free to use the stock for the calculation of the local tax as part of the "corporate excess"[6] employed by the corporation within the state, notwithstanding the fact that such intangibles had no situs in the taxing state which would have brought them within its jurisdiction for the purpose of imposing a direct property tax.

There is no merit in plaintiff's contention that R.S. 47:606B, "even though styled a 'franchise tax,' contravenes the constitutional prohibitions against extraterritorial taxation, in that it allows the Collector of Revenue to reach indirectly by an allocation formula, intangible property of the taxpayer which cannot be reached directly," since "the name given a tax does not control" and intangibles "may be taxed only at their situs, the legal domicile of their owner," in the absence, as here, of one of the "recognized exceptions" (i. e., the establishment by the corporation of a "commercial domicile" in the taxing state or the acquisition of a "business situs" therein by the in-

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(6) The franchise tax was levied on the "corporate excess" employed within Massachusetts, said excess being defined as "such proportion of the fair cash value of all the shares constituting the capital stock * * * as the value of the assets, both real and personal, employed in any business within the commonwealth * * * bears to the value of the total assets of the corporation."

tangibles). We agree with the District Court's ruling that "it is immaterial whether or not the taxpayer has established a legal or commercial domicile or a business situs of the intangibles in Louisiana; nor is it necessary that the certificates representing the investment in stocks and bonds of the subsidiaries be located or used within Louisiana," citing as authority Arkansas Fuel Oil Corporation v. Fontenot, decided by this Court in 1954.[7] That case is clearly decisive of the point. The plaintiff there, a Delaware corporation, had its principal office in Louisiana but functioned here simply as a holding company, possessing few assets within the state; two of its wholly owned subsidiaries (chartered in other states) did business here as well as elsewhere. All had paid taxes computed under provisions of R.S. 47:606A. The parent company, in resisting a substantial additional assessment brought about by application of provisions of R.S. 47:606B, contended that because (a) interest and dividends received by it from the other corporations were not revenues "attributable to Louisiana," and (b) the amounts of its investments in and advances to those corporations were not property and assets situated in Louisiana, the Collector, in allocating to Louisiana a proportion thereof, had made a determination of tax liability contrary to the provisions of the statute, and hence there resulted an unlawful exaction—with an alternative plea of unconstitutionality of the statute as violative of due process and other guarantees of the Federal and State Constitutions. In rejecting plaintiff's argument that the allocation of "intercompany items" to Louisiana, under Section 606, Subd. B [now R.S. 47:606B], "is merely a limitation on the amount of assets actually situated or used in Louisiana which can be allocated to Louisiana under Section 606, Subd. A." the Court signifi-

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(7) 225, La. 166, 72 So.2d 465, cert. den., 348 U.S. 804, 75 S.Ct. 46, 99 L.Ed. 635.

cantly observed: "This could not be the meaning of this provision [Subd. B] *as the location of the assets of the corporation is of no importance in this statute except insofar as the value of the assets situated within and wihout Louisiana are used in determining one of the ratios under Section 606, Subd. A.* It is not the actual capital employed in the State of Louisiana but the proportion of the entire 'taxable capital' which is allocated to Louisiana, as capital employed in Louisiana, that the tax rate is applied to." (225 La. at 184, 72 So. 2d at 471—emphasis supplied.)[8] and while it is true we made a specific finding that the taxpayer had established its commercial domicile in Louisiana, this came about through the plaintiff's allegation that it did not actually engage in or transact any business in Louisiana, and was a pronouncement by the Court in support of the Collector's position that Delaware was merely the incorporating or qualifying state of plaintiff, where none of its operations were conducted and none of the intangibles were used in connection with its business; that rather, its business activities were here in Louisiana and the intangibles were used here in connection with those activities. But the language quoted above shows that this finding was not the controlling consideration, and

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(8) A succinct observation on this form of taxation, made in connection with a comment on the Arkansas Fuel Oil case, is that "A corporation which determines to operate through the agency of subsidiaries must be presumed to have sound and economically desirable ends in view. For the right it confers upon the corporation to exploit these advantages a state must be accorded the right to exact tax revenue in return." Charles A. Reynard, State and Local Taxation (a section of the symposium on the work of the Louisiana Supreme Court, 1953—54 term), 15 La.L.Rev. 337, at 339, 340.

therefore plaintiff's reliance on that case as upholding the proposition for which it now contends is misplaced.

For the reasons assigned, the portion of the District Court's judgment rejecting plaintiff's demand for the return of the sum of $30,383.66, representing the tax deficiency and interest thereon paid under protest to the Collector of Revenue as a result of the application of provisions of R.S. 47:606B, is affirmed.

APPENDIX B

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA

(SINCE SUCCEEDED BY ROBERT L. ROLAND, SINCE SUCCEEDED BY ROLAND COCKREHAM)

NUMBER 62,543

DIVISION "D"

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

JUDGMENT

This cause having been duly heard and submitted to the Court for adjudication and the Court considering the law and the evidence to be partly in favor of the plaintiff, The Kansas City Southern Railway Company and partly in favor of the Collector of Revenue of the State of Louisiana for the written reasons assigned this date.

• • • •

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Louisiana Revised Statutes of 1950, Section 47:606, as amended, is constitutional as applied to this taxpayer in this case and does not violate the pro-

visions of the Fourteenth Amendment of the Constitution of the United States or Article 1 Section 2 of the Constitution of the State of Louisiana and therefore let there be judgment herein in favor of the defendant, Collector of Revenue, and against the plaintiff, The Kansas City Southern Railway Company:

(3) Rejecting plaintiff's demand for the return of the sum of $30,383.66, which sum represents the tax deficiency and interest thereon paid under protest to the Collector as a result of the inclusion in the Louisiana property and assets and Louisiana revenues for the purpose of determining the average of ratios plaintiff's investment in and revenues from subsidiary corporations as provided in R. S. 47:606 B and,

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THUS DONE AND SIGNED in Baton Rouge, Louisiana, this 2nd day of May, 1961.

COLEMAN LINDSEY

DISTRICT JUDGE

APPENDIX C

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (SINCE SUCCEEDED BY ROBERT L. ROLAND, SINCE SUCCEEDED BY ROLAND COCKREHAM)

NUMBER 62,543

DIVISION "D"

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

REASONS FOR JUDGMENT

(1) Louisiana Revised Statutes 47:606 is constitutional as applied to the taxpayer in this case. This Court considers that because the plaintiff corporation is subject to the Louisiana Corporation Franchise Tax, under the holding of *Arkansas Fuel Oil Corporation v. Fontenot*, 225 La. 166, 72 So. 2d 465 (1954) in applying La. R.S. 47:606 it is immaterial whether or not the taxpayer has established a legal or commercial domicile or a business situs of the intangibles in Louisiana; nor is it necessary

that the certificates representing the investment in stocks and bonds of the subsidiary be located or used within the State of Louisiana.

• • • •

Baton Rouge, Louisiana
May 2, 1960.

COLEMAN LINDSEY

District Judge

APPENDIX D

Pertinent Provisions of The

Louisiana Corporation Franchise Tax Law

Chapter 5 of Title 47,

Louisiana Revised Statutes of 1950, as Amended

LOUISIANA CORPORATION FRANCHISE TAX LAW

Sec.

601. Imposition of tax.

§ 601. *Imposition of tax*

Every domestic corporation and every foreign corporation, exercising its charter, authorized to do or doing business in this state, subject to compliance with all other provisions of law, except as otherwise provided in this Chapter, shall pay a tax at the rate of one dollar and fifty cents ($1.50) for each one thousand dollars ($1,000.00) or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital determined as hereinafter provided; provided that the minimum tax shall not be less than ten dollars ($10.00) in any case. The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter, or the continuance of its charter within this state.

602. Determination of taxable capital.

603. Borrowed capital.

604. Capital stock.

605. Surplus and undivided profits.

606. Allocation of taxable capital.

§ 606. *Allocation of taxable capital*

A. *General allocation formula.* For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(1) The ratio that the net sales and other revenue attributable to Louisiana bears to the total net sales and other revenue. The Louisiana sales factor shall be one-half of the sales secured through the efforts of salesmen attached to or sent from offices, agencies, or other places of business within the state, plus one-half of the sales of merchandise delivered in Louisiana.

(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used. In determining value, depreciation and depletion reserves must be deducted from the book values of the properties in question.

B. *Allocation of intercompany items.* For the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the par-

ent or subsidiary corporation. A subsidiary corporation is any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; which latter corporation shall be termed the parent corporation.

C. *Minimum allocation; assessed value of real and personal property.* The portion of capital stock, surplus, undivided profits and borrowed capital allocated for franchise taxation under this Chapter shall in no case be less than the total assessed value of real and personal property in this state of each such domestic or foreign corporation for the calendar year preceding that in which the tax is due.

607. Railroad corporations.

608. Exemptions.

609. Reports.

610. Accrual and payment of tax.

611. Newly organized or qualified corporations; minimum tax.

612. Extension of time for filing return and paying tax.

613. Fiscal year defined; accounting period not to be changed.

614. Cost of collection.

615. Disposition of collections.

616. Franchise taxes by local governments prohibited.

APPENDIX E

EXCERPTS FROM PETITION

"18.

"Petitioner's investments in the three wholly owned subsidiary corporations named in the next preceding article hereof have their situs in Missouri; the earnings on said investments are, therefore, applicable to the State of Missouri. Said investments and earnings are, therefore, extraterritorial as to the State of Louisiana. Petitioner avers that the State of Louisiana does not have jurisdiction to tax a non-resident or foreign corporation on property located or business done beyond the borders of this state. Petitioner further avers that what the State of Louisiana cannot do by direct taxation, it cannot do through the use of allocation and apportionment formulae which, in effect, tax extraterritorial property or business. Defendant's allocation to Louisiana of any part of petitioner's investment in property having its situs outside of the State of Louisiana and defendant's allocation to Louisiana of any of petitioner's earnings on property located outside of the State of Louisiana constitute an unlawful burden on interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States, and a taking of petitioner's property without due process of law in violation of Article 1, Section 2, of the Constitution of the State of Louisiana and the Fourteenth Amendment to the Constitution of the United States.

19.

"Defendant's interpretation and application of Louisiana Revised Statutes 47:601, et seq., particularly

Louisiana Revised Statutes 47:606, are arbitrary and unreasonable, and purport to authorize taxation beyond the taxing jurisdiction of the State of Louisiana in so far as said interpretation and application would attribute to Louisiana a portion of the investment in, and revenues from, stock and other securities held by petitioner, a foreign corporation with its legal and commercial domicile in the State of Missouri, in another foreign corporation and in other domestic corporations.

20.

"In the alternative, if the Court should sustain defendant's interpretation and application of the said statutes, petitioner avers that said statutes, particularly Louisiana Revised Statutes 47:606, are unreasonable and purport to authorize taxation beyond the taxing jurisdiction of the State of Louisiana, and therefore constitute a taking of petitioner's property without due process of law in violation of Article 1, Section 2, of the Constitution of the State of Louisiana and the Fourteenth Amendment to the Constitution of the United States."

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No. 918

In the Supreme Court of the United States

OCTOBER TERM, 1961

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
APPELLANT,

v.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),
APPELLEE.

MOTION TO DISMISS ON BEHALF OF THE COLLECTOR OF REVENUE

EMMETT E. BATSON
Room 403
Capitol Annex Building
Baton Rouge, Louisiana
Attorney for Appellee

No. 918

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v.

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),
APPELLEE.

MOTION TO DISMISS ON BEHALF OF THE COLLECTOR OF REVENUE

Appellee, through undersigned counsel of record, respectfully moves that this appeal be dismissed on the following grounds:

No substantial federal question is raised by the facts of this case. The appointment formula set out by the Legislature of Louisiana meets all the tests of fairness and reasonableness which have been imposed on the state's power to tax by the United States Constitution as interpreted by this Court.

STATEMENT OF THE CASE

Appellant is engaged in the transportation of passengers, freight, and mail by rail in the State of Louisiana and owns all of the stock of three subsidiary corporations doing business in Louisiana. These subsidiaries and the percentage of business done by each in Louisiana during the years in controversy are as follows:

The Louisiana and Arkansas Railway Company (Delaware)

1951	73.3185%
1952	70.9843%

Kansas City Southern Transport Company (Louisiana)

1951	55.0%
1952	57.9%

Kansas City, Shreveport Gulf Terminal Company (Louisiana)

1951	100%
1952	100%

The tax involved in this litigation is the Louisiana Corporation Franchise Tax which is levied on domestic and foreign corporations doing business in Louisiana. The amount of tax paid by a corporation is determined by the amount of capital stock, surplus, and borrowed capital of the corporation and the proportion of its business which is done in Louisiana.

The extent to which the taxpayer is deemed to have used its franchise in Louisiana is determined by

the use of a two factor allocation formula based on income and assets.

ARGUMENT

The issue in this case concerns the validity of the allocation formula provided by La. R.S. 47:606. Appellant, The Kansas City Southern Railway Company, contends that paragraph B of this section as applied to it violates the due process clause of both the United States and the Louisiana Constitution.

R.S. 47:606B provides for the allocation of taxable capital within and without Louisiana as follows:

> "*Allocation of Intercompany Items.* For the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the parent or subsidiary corporation."

This section is in effect a special provision governing the allocation of assets and revenues in the case of a parent or subsidiary corporation. Thus, if a corporation owns, in addition to its other assets within and without Louisiana, stock in a corporation which has a 50% ratio for Louisiana Corporation Franchise Tax purposes, then 50% of the investment in the subsidiary must be included in the Louisiana assets used to determine the ratio of Louisiana assets to total assets. The same must be done with revenues from a subsidiary.

This provision *does not levy a tax on the investment of Kansas City Southern in its subsidiaries* which

operate in Louisiana. It simply uses a portion of this investment and a portion of the revenues from the subsidiaries in computing two ratios which measure the extent of the capital employed by Kansas City Southern in Louisiana.

This case presents no issue of a property tax on the stock owned by Kansas City Southern. The franchise tax is an excise tax for the privilege of operating in the corporate form. The question here is the validity of the allocation formula established by the Legislature to be used in determining the proportion of a corporation's "taxable capital" to be taxed by Louisiana. This is a matter within the discretion of the Legislature.

In *New York v. Latrobe*, 279 U.S. 421, 49 S.Ct. 377, 50 S.Ct. 79, 65 ALR 1341 this Court held:

> "There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 126, 54 L.ed. 688, 694, 30 Sup. Ct. Rep. 496; Delaware R. Tax, 18 Wall. 206, 231, 21 L. ed. 888, 896. Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business *(Southwestern Oil Co. v. Texas, supra; Quong Wing v. Kirkendall*, 223 U.S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Williams v. Fears*, 179 U.S. 270, 275, 45 L. ed. 186, 189, 21 Sup. Ct. Rep. 128. See *Connolly v. Union Sewer Pipe Co.* 184 U.S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431), or the particular

form in which it is carried on (see *Home Ins. Co. v. New York*, 134 U.S. 594, 606, 33 L. ed. 1025, 1031, 10 Sup. Ct. Rep. 593), so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state (see *Robert & S. Co. v. Emmerson*, 271 U.S. 50, Supra, at p. 57 [70 L. ed. 834, 45 A.L.R. 1495, 46 Sup. Ct. Rep. 376])."

Therefore, if the statute is reasonably related to the business of Kansas City Southern and its interests in the State of Louisiana, there is no denial of due process of law.

In the case of *National Leather Co. v. Commonwealth of Massachusetts*, 277 U.S. 413, 48 S. Ct. 534 (1928) an application of a Massachusetts' excise tax was challenged. The National Leather Co. was a Maine corporation doing business in Massachusetts. It also owned the entire stock of two subsidiary corporations chartered in Maine but operating in Massachusetts. The Massachusetts tax statute levied a tax for the privilege of doing business at the rate of five dollars ($5.00) per thousand upon the value of the corporate excess employed within the commonwealth. In determining the corporate excess employed in Massachusetts the commissioner of corporations included all the capital stock of the subsidiaries operating in Massachusetts, but did not include stocks in corporations not operating in Massachusetts. The taxpayers claimed a denial of due process. In upholding the tax and the Massachusetts court this Court said:

"For present purposes it may be assumed

that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that State for the purpose of imposing a direct property tax. See *Rhode Island Trust Co. v. Doughton*, 270 U.S. 69, 80, 46 S.Ct. 256 (70 L.ed. 475, 43 A.L.R. 1374). But here the statute does not impose any direct tax upon these stocks, and, as construed by the Massachusetts court, merely treats them as assets employed by the petitioner in its business within the State, and therefore requires that they be included when the total assets so employed by it are computed for the purpose of arriving at the proportionate part of the value of its own capital shares—determined by comparing the assets employed in business within the State with the total assets wheresoever employed or located —on which the excise for the privilege of carrying on its business within the State is imposed.

"It is settled law that a State may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its total gross receipts that are received within the State, *Maine v. Grand Trunk Ry. Co.*, 142 U.S. 217, 228, 12 S.Ct. 121, 163 (35 L.ed. 944); or by the proportionate part of its total capital stock which is represented by the property located and business transacted within the State, *Hump Hairpin Co. v. Emmerson*, 258 U.S. 290, 293, 42 S.Ct. 305 (66 L.ed. 622); *American Mfg. Co. v. St. Louis*, (C.C.A.) 8 F. (2d) 447, 450; or by the proportionate part of its total net income which is attributable to the business carried on within the State, *Underwood Typewriter Co. v. Chamberlain*,

254 U.S. 113, 120, 41 S.Ct. 45 (65 L.ed. 165); *Bass, etc., Ltd., v. Tax Comm.*, 266 U.S. 271, 282, 45 S.Ct. 82 (69 L.ed. 282).

"Here both the commissioner, the administrative officer charged with the enforcement of the statute, and the Massachusetts court, have found that the capital stocks of the two subsidiary companies were employed by the petitioner in carrying on its business within Massachusetts. We find no adequate reason for disturbing this conclusion. On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner, through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts—to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the State. *Cf Edwards v. Chile Copper Co.*, 270 U.S. 452, 456, 46 S.Ct. 345 (70 L.Ed. 678). And since the Massachusetts court did not determine whether the value of the stock in the Lawrence Company attributable to that part if its business and property in other States should have been deducted, for the reason that, as to such overvaluation, if any, a different statutory remedy was provided, we have no occasion to consider that question." (Emphasis Added)

The National Leather Company case above is on all fours with the instant case, and that case has been followed since it was decided in 1928. In that case the two subsidiaries were employed to carry on the parent

corporation's business in Massachusetts. The facts in the instant case clearly show that Kansas City Southern uses its subsidiaries in its business in Louisiana. The Kansas City Southern has 222.45 miles of mainline track in the State of Louisiana. It has approximately 750 employees in Louisiana. In addition to this very substantial business in its own name, it owns 100% of the Louisiana and Arkansas Railway Company which does about 70% of its business in Louisiana. This subsidiary is engaged in the railway business and its lines meet with those of Kansas City Southern in Shreveport and connect that city with New Orleans. The home office of the Louisiana and Arkansas is in Shreveport, and it has in Louisiana 422.74 of its total of 633.83 miles of mainline track. The Louisiana and Arkansas has no operating facilities at all in Missouri, and all of the accounting functions of this corporation are in Shreveport, Louisiana, where there is a treasurer's office.

The other two subsidiaries involved in this case are the Kansas City Southern Transport Company, a Louisiana corporation which operates a motor freight line serving the customers of the Kansas City Southern and The Louisiana and Arkansas; and the Kansas City, Shreveport Gulf Terminal Company, a Louisiana corporation which operates a depot in Shreveport, Louisiana, and does no business in any other state. All of these corporations are integral parts of the railway system known as The Kansas City Southern Lines.

Certainly the investment of Kansas City Southern in these subsidiaries represents capital employed by

Kansas City Southern. A corporation which chooses to operate through subsidiary corporations must have sound and economically desirable reasons for so doing. For the right it confers upon the corporation to exploit these advantages a state should have the right to tax.

The Legislature of Louisiana has provided a formula for allocating capital within and without Louisiana and this formula should be allowed to stand.

This Court dismissed an appeal involving the same provision being challenged here in the case of *Arkansas Fuel Oil Corporation v. Fontenot*, 225 La. 166, 72 So 2d 465, appeal dismissed 348 US 804, 75 S. Ct. 46, 99 L. Ed 635. The National Leather Co. case, supra, is on all fours and no issue which has not been decided by this Court has been raised by Appellant.

CONCLUSION

It is respectfully submitted that the allocation formula set out in La. R.S. 47:606 B is fair and reasonable and is a valid exercise of the state taxing power which does not infringe on the constitutional rights of appellant.

For the foregoing reasons it is respectfully submitted that the appeal should be dismissed.

Respectfully submitted,

S/ EMMETT E. BATSON

EMMETT E. BATSON
Counsel for Respondent

May 25, 1962

PROOF OF SERVICE

I, Emmett E. Batson, attorney of record for respondent in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon petitioner by depositing same this 25th day of May, 1962, in the United States post office, first-class postage prepaid, addressed to Honorable W. Scott Wilkinson, attorney of record for petitioner, at 17th Floor Beck Building, Shreveport, Louisiana.

S/ EMMETT E. BATSON

EMMETT E. BATSON

2756-B, 5-62

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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),

Appellee

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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MAY IT PLEASE THE COURT:

The federal question presented by this appeal is indeed substantial! The Louisiana Supreme Court has announced that:

> "• • • there is no extraterritorial exertion of the taxing power involved in including property located in other states in measuring a tax imposed upon a privilege."(1)

(1) La. S.Ct. Opinion, 135 So. 2d 915, 918.

The Louisiana Court holds that the State of Louisiana may tax the privilege enjoyed by a nonresident corporation of owning assets located wholly beyond the State's jurisdiction and which are not used by the taxpayer in furtherance of its business or franchise in Louisiana!

The well-established principles upon which jurisdiction over the intangibles of a non-resident has been based in order to meet the test of constitutionality, i.e., a "commercial domicile" of the nonresident in the taxing state, or a "business situs" or use of the intangibles there, are held to be "immaterial" by the Louisiana Court, which says:

> "* * * it is immaterial whether or not the taxpayer has established a legal or commercial domicile or a business situs of the intangibles in Louisiana; nor is it necessary that the certificates representing the investment in stocks and bonds of the subsidiaries be located or used within Louisiana."(2)

Thus, the Louisiana Supreme Court upholds the constitutionality of the Louisiana statute which levies a tax upon a privilege which was **not** granted by the State of Louisiana but only granted and enjoyed by the taxpayer in the State of Missouri.

This decision is completely contrary to the rulings of this Court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1937), *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71 (1924), *St. Louis Compress Co. v.*

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(2) La. S.Ct. Opinion, 135 So. 2d 915, 919.

Arkansas, 260 U.S. 346 (1922), and *cf. Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1936).

Counsel for the Collector of Revenue argues that the allocation formula is fair and reasonable and therefore does not infringe upon due process of law.

The primary question which must first be answered is "Does the State of Louisiana have jurisdiction to include the intangibles **as Louisiana assets** of the non-resident taxpayer under any method of allocation (reasonable or otherwise)?" Before counsel for the Collector can discuss the reasonableness of the allocation formula he must first show that the intangibles (which under the formula are classified as Louisiana assets in computing the ratios which measure the tax) are subject to the taxing jurisdiction of the State of Louisiana — by showing that the appellant has established a "commercial domicile" in Louisiana, or that appellant has used *in Louisiana* the stock of its subsidiaries *in its Louisiana business* so as to give the stock a "business situs" in the State of Louisiana.

It is the position of appellant that if it is determined that the formula set out in La. R.S. 47:606B can be applied to the appellant **without first finding jurisdiction** over the intangibles and income allocated, then the formula is *ipso facto* unfair and unreasonable and constitutes a denial of due process for the reason that it is predicated upon property and income over which the State of Louisiana does not and cannot exercise jurisdiction.

Counsel for the Collector makes a futile attempt in his brief to establish a "business situs" of the intangibles.

But the question of whether or not the Appellant has established a "business situs" of the stocks in Louisiana is not an issue in this case! Any such factual issue has been rendered moot by the decision of the Louisiana Supreme Court which holds that such elements of taxing jurisdiction are "immaterial."

The Louisiana Court holds that NO JURISDICTION over the intangibles is necessary for Louisiana to tax, *as a Louisiana privilege*, the privilege of owning the assets that the nonresident enjoys only in the State of Missouri.

Counsel for the Collector erroneously relies upon the case of *National Leather Co. v. Commonwealth of Massachusetts*, 277 U.S. 413, (1928) as being on "all fours" with the instant case. (Appellee's motion p. 9)

An examination of the *National Leather Co.* case shows that the parent company was engaged in the business of purchasing raw hides and selling finished leather. The parent company had no facilities to process or tan the hides, it owned no tanneries — it was not an *operating* tanning company but merely a *holding* company. The subsidiary corporations *through which* the parent operated were, however, engaged in the business of tanning leather. The parent (a Maine corporation) was engaged in the tanning business in the State of Massachusetts *through* its subsidiaries, not *independently* of them. In holding that the stock of the subsidiaries were properly

included as a measure of the Massachusetts franchise tax, this Court found from the evidence that:

> "The business of the National Leather Company — hereinafter called the petitioner — was the purchasing of hides and skins, having them tanned by other companies, and selling the leather **through** the tanners. It operated no tanneries itself. Its business was conducted wholly in Massachusetts; its business offices were located there; and it carried on no active business outside the state. (277 U.S. 420).
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> • • • •
>
> "The *entire business* of the petitioner was conducted in this commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner *made use* of the activities of these subsidiary corporations as *essential* parts of its business." (277 U.S. 422) (Emphasis added)

The Kansas City Southern Railway Company, appellant, on the other hand, operates its own railroad as an operating company, separate and apart from and **not through** its subsidiaries. If appellant owned no stock in subsidiary corporations it could continue to operate in Louisiana as it now does separately and apart from its subsidiaries, and as it did for 40 years prior to buying the stock of L&A.

The *National Leather Company* case is not at all applicable to the instant case.

Likewise, *Arkansas Fuel Oil Corporation v. Fontenot*, 225 La. 166, 72 So. 2d 465, in which, as appellee points out at page 9 of his Motion, an appeal to this Court was dismissed in 348 U.S. 804, was merely another situation, like the *National Leather Company* case, *supra*, in which a foreign holding company operated **through** its subsidiaries in Louisiana. There, the Louisiana Supreme Court upheld the constitutionality of Section 606B of the Louisiana Corporation Franchise Tax Statute on the ground that Louisiana's jurisdiction to tax the privilege of owning the intangibles was founded upon "commercial domicile" and "business situs" of the nonresident parent corporation in the State of Louisiana. In *Arkansas Fuel Oil Corporation* the Louisiana Court held"

> "In this case, the policies were carried on and the greater part of the business of the plaintiff corporation conducted at Shreveport by its officers who resided there, under authority of the board of directors *and that is what established for it a 'commercial domicile' and gave it a business situs in Louisiana for the purpose of taxing its intangibles* used in or incidental to its business here." *Arkansas Fuel Oil Corporation v. Fontenot*, 225 La. 166, 181-182, 72 2d 465, 470-471 (1954). (Emphasis added)

No such factual finding by the Louisiana Court is present here. The Court now holds that these well-founded tests for finding jurisdiction may be completely disregarded and that the State of Louisiana may include in its privilege tax computation, **as Louisiana assets and Louisiana income**, intangible property and income there-

from which is admittedly beyond the taxing jurisdiction of the State **and over which Louisiana offers no privilege or protection whatsoever.**

To completely disregard the constitutional safeguards of the Fourteenth Amendment against the taking of one's property without due process of law through the means of extraterritorial taxation presents a substantial federal question of the highest degree!

It is respectfully submitted that Appellee's motion to dismiss this appeal should be overruled and that the appeal should be granted, and the decision of the Louisiana Supreme Court reversed.

Respectfully submitted,

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CERTIFICATE

I, W. Scott Wilkinson, one of the attorneys for Appellant herein, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the ..... day of May, 1962, I served copies of the foregoing Brief In Opposition To Appellee's Motion To Dismiss upon Appellee by mailing copies in a duly addressed envelope, with postage prepaid to Emmett E. Batson, Esq., Room 403, Capitol Annex Building, Baton Rouge, Louisiana, counsel of record for Appellee.

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W. Scott Wilkinson